BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THERESA L. GUILLAUME	)	
Claimant	)	
	)	
VS.	)	
	)	
BOEING COMPANY	)	
Respondent	)	Docket Nos. 255,016
AND	)	261,067
	)	
INS. CO. STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the September 29, 2003 Award of Special Administrative Law Judge J. Paul Maurin III. The Board heard oral argument on March 16, 2004.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

These two docketed claims were consolidated for the purpose of litigation. The first claim (Docket No. 255,016) alleges injury from May 17, 1996 through February 10, 1999. The second claim (Docket No. 261,067) alleges a September 25, 2000 accident date. Both claims alleged the claimant suffered respiratory injury as a result of exposure to chemicals at work for respondent.

The Special Administrative Law Judge (SALJ) determined claimant suffered an aggravation to her preexisting chronic obstructive pulmonary disease because of exposure to chemical fumes while at work for respondent. In Docket No. 255,016, claimant was

awarded benefits based upon a 40 percent permanent partial functional impairment. In Docket No. 261,067, the SALJ concluded claimant was permanently and totally disabled from substantial and gainful employment. In the calculation of the Award there was a reduction in the permanent total disability compensation awarded based upon the preexisting 40 percent impairment pursuant to K.S.A. 44-501(c).

The respondent requested review and argues that claimant failed to meet her burden of proof in Docket No. 255,016 to establish that she suffered any permanent impairment as a result of her injuries. In Docket No. 261,067 respondent argues that claimant did not meet her burden of proof to establish that she is permanently and totally disabled. Respondent argues claimant should be limited to an approximate 49 percent work disability.

The claimant requests the Board to affirm the SALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The SALJ's Award contains a detailed recitation of the record and it is not necessary to repeat those facts herein. The Board adopts the findings of fact made by the SALJ that are not inconsistent with the findings and conclusions stated in this Order.

Docket No. 255,016

The SALJ determined that claimant's exposure to chemical fumes at work ended when she left work on February 10, 1999. Accordingly, the SALJ concluded the date of accident was February 10, 1999.[1] The SALJ further determined claimant had suffered an aggravation to her preexisting chronic obstructive pulmonary disease which resulted in a 40 percent whole person permanent partial functional impairment.

In Docket No. 255,016, the sole issue raised on review by the respondent is whether claimant met her burden of proof to establish she suffered any permanent impairment as a result of her exposure to chemicals during the time period from May 1996 through February 1999.

As detailed by the SALJ, the claimant alleged that she began to experience breathing difficulties several months after she began working for respondent in March 1996. However, it was not until a specific incident where claimant inhaled methylethyl

[1] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

ketone in May 1998 that she began receiving medical care from respondent's medical department as well as Drs. Thomas J. Bloxham and Richard W. Spann. Claimant continued working while receiving sporadic medical care. At some point the respondent placed claimant in an office environment as an expediter in order that claimant avoid chemical exposure. On February 10, 1999, claimant was laid off because respondent would no longer accommodate her temporary restrictions against exposure to chemicals. The claimant applied for and received unemployment benefits through the end of August 1999. But she was unable to find a job and did not work anywhere after she was laid off by respondent.

A preliminary hearing was held on March 18, 2000. At the completion of the hearing, the ALJ entered a preliminary hearing Order dated the same date that found claimant's exposure to chemicals at work at least temporarily exacerbated a preexisting underlying condition. The ALJ also authorized Dr. Richard Spann for all medical treatment.

Claimant continued to receive treatment with Dr. Spann until he ultimately released claimant without restrictions in approximately August 2000. The respondent then re-hired claimant and she returned to work on September 21, 2000. However, on September 25, 2000, claimant again suffered exposure to chemical fumes and had to be transported to the emergency room because of breathing difficulties. This specific incident is the subject of claimant's claim in Docket No. 261,067.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

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[2] K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.,* 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.,* 236 Kan. 237, 689 P.2d 871 (1984).

[3] K.S.A. 44-508(g). *See also In re Estate of Robinson,* 236 Kan. 431, 690 P.2d 1383 (1984).

[4] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[5] *Springston v. IML Freight, Inc.,* 10 Kan. App. 2d 501, 502, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[6] The record in this case, however, fails to prove that claimant suffered a permanent aggravation of claimant's preexisting chronic obstructive pulmonary disease.

Dr. Daniel C. Doornbos offered the only opinion regarding the claimant's functional impairment. As noted by respondent, Dr. Doornbos did not examine claimant until after she suffered the chemical exposure on September 25, 2000. Dr. Doornbos was authorized to provide claimant additional medical treatment and after she had reached maximum medical improvement the doctor opined claimant had suffered a 26 to 50 percent permanent partial whole person functional impairment.

As previously noted, claimant had been treated for her breathing difficulties and then released to work without restrictions as a result of chemical exposures before she was examined by Dr. Doornbos. Although Dr. Doornbos provided a functional impairment rating he did not apportion that rating between the first and second docketed claims. Nor did the doctor offer an opinion that claimant had a preexisting functional impairment before the September 25, 2000 incident at work. It would be speculative to apportion a percentage of Dr. Doornbos' rating between the two docketed claims. Consequently, in Docket No. 255,016, the Board finds claimant has failed to sustain her burden of proof to establish she suffered any permanent impairment as a result of her exposure to chemical fumes.

However, the Board further finds that claimant did meet her burden of proof that she suffered a temporary aggravation of her preexisting chronic obstructive pulmonary disease and is entitled to temporary total disability compensation and medical compensation for the treatment she received until released by Dr. Spann.

At regular hearing the respondent reported paying a total of $63,267.28 in temporary total disability compensation at the rate of $366 per week. An itemization of the dates such compensation was paid was not provided. Instead, respondent stated the total included amounts paid in both docketed claims and both respondent and claimant thought it likely that most of the payments were made in Docket No. 261,067.

As previously noted, claimant was laid off on February 10, 1999, and received unemployment benefits through August 1999. A review of the file indicates that on February 6, 2001, the ALJ entered an order that claimant was entitled to temporary total disability compensation beginning March 10, 1999, and continuing until claimant was released to substantial gainful employment. Dr. Spann had released claimant from

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[6] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 202, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.,* 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

treatment in August 2000 without restrictions. Because the claimant testified that she received unemployment compensation through August 1999 she would not be entitled to temporary total disability compensation for that time period. On May 18, 2000, the ALJ entered an order which authorized Dr. Spann to provide claimant treatment. Consequently, the Board finds claimant is entitled to temporary total disability compensation from May 18, 2000, through August 1, 2000, or a period of 10.86 weeks.

Accordingly, in Docket No. 255,016 the Board modifies the SALJ's Award to reflect claimant is entitled to temporary total disability compensation and medical compensation until she was released from treatment by Dr. Spann.

Docket No. 261,067

The SALJ determined the claimant suffered permanent and total disability as a result of her exposure to methyl ethyl ketone and other chemicals on September 25, 2000.

In August 2000 the authorized treating physician, Dr. Spann, determined that claimant could return to work without restrictions. Dr. Spann had been treating claimant for shortness of breath claimant had experienced as a result of exposure to chemical fumes.[7] Upon learning the claimant had been released from treatment without physical restrictions, the respondent re-hired claimant and she returned to work on September 21, 2000.

On September 25, 2000, the claimant was placed in a department where she was exposed to methyl ethyl ketone as well as other chemicals. Claimant began to experience difficulties breathing. Her condition worsened and an ambulance was summoned to transport claimant to the St. Joseph Hospital emergency room. Claimant remained in the hospital overnight and was released the following day.

Because she worked the second shift, claimant returned to work the same day she was released from the hospital. Claimant reported to central medical at respondent's plant where she received restrictions. However, claimant's supervisor told her that there was no work available within her restrictions and she was sent home. Claimant has not worked for anyone since that day.

On September 28, 2000, Dr. Doornbos performed a court ordered independent medical examination of the claimant. Dr. Doornbos' October 2, 2000 IME report indicated claimant had obstructive airway disease. The cause of the disease was most likely claimant's 30-year cigarette smoking history. But the doctor further concluded this

[7] The claim in Docket No. 255,016 was the subject of the injuries for which claimant received treatment from Dr. Spann.

preexisting condition was aggravated or exacerbated by claimant's chemical exposure while employed by the respondent.

Medical treatment was authorized through Dr. Doornbos. After treating the claimant on an intermittent basis for approximately one and a half years, the doctor determined claimant had reached maximum medical improvement on June 21, 2002, and that it was time that she return to work.

The doctor imposed permanent restrictions: (1) claimant should have no exposure to chemicals or concentrations that would require her to wear a respirator mask to meet OSHA standards; (2) claimant have no exposure to even trace concentrations of toluene diisocyanate; (3) claimant have the discretion to leave the work area and seek medical attention if she begins to experience respiratory problems; and, (4) claimant and respondent keep track of all workplace absences due to illness and provide that information to the doctor. From the nature of the last restriction it would appear the doctor was anticipating that claimant would return to work for respondent.

Based upon the AMA *Guides*[8] the doctor opined claimant had suffered a 26 to 50 percent functional impairment. The doctor noted that he could not provide a more definitive opinion. Finally, the doctor reviewed a task list of claimant's jobs in the 15 years preceding her accident which was compiled by Mr. Jerry Hardin. The doctor reviewed the task list and concluded claimant could no longer perform 24 of 46 tasks for a 52 percent task loss.

Mr. Dan R. Zumalt interviewed the claimant on behalf of respondent and opined that claimant retained the ability to earn between $8 and $9 an hour in the open labor market. Mr. Zumalt further opined that, based upon his experience working with individuals with respiratory problems requiring a chemical restricted or chemical free work environment, claimant could obtain employment in the open labor market. Mr. Hardin also opined claimant could obtain employment in the open labor market in office type jobs.

The claimant testified that she cannot work because she becomes short of breath and fatigued with any physical exertion.

Respondent argues that claimant has not met her burden proof to establish that she is permanently and totally disabled. The Board agrees.

The SALJ noted that when Dr. Doornbos began treating claimant he expressed concern that he would be able to return claimant to employment. Nonetheless, Dr. Doornbos agreed that over the course of treatment claimant's condition did improve and that through psychological desensitization treatments the claimant's environmental

[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

intolerance improved. Although he continued to express concerns about her ability to find a chemical free work environment he noted that she should attempt to return to work. And the doctor specifically noted that it was difficult to determine how much of claimant's shortness of breath and fatigue was due to her lung disease and how much was due to her deconditioning and obesity.

The doctor noted he simply did not have any clear proof one way or the other whether claimant would or would not do well upon a return to the workplace. But he concluded claimant would have to try a return to the workplace to see what would happen. And when reviewing the claimant's prior jobs in office settings or a work environment free of chemicals and fumes, the doctor concluded claimant could still perform those jobs.

Although the doctor expressed concerns about claimant's return to work, he agreed that his restrictions would not prevent her from employment in a work environment free of chemicals and fumes. Moreover, Mr. Zumalt and Mr. Hardin expressed opinions that claimant would be able to locate such environments in the open labor market. Lastly, Dr. Doornbos did not express an opinion that claimant would be unable to engage in substantial gainful employment. The Board concludes claimant has failed to meet her burden of proof that she is permanently and totally disabled.

Accordingly, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Kansas Court of Appeals held a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

Initially, it should be noted that Dr. Doornbos offered the only opinion regarding claimant's functional impairment. The doctor opined claimant had suffered a 26 to 50 percent functional impairment. Consequently, the Board finds claimant has suffered a 38 percent functional impairment.

The next analysis is whether claimant has a work disability greater than the functional impairment. As previously noted, Dr. Doornbos reviewed a task list of claimant's jobs in the 15 years preceding her accident which was compiled by Mr. Jerry Hardin. The doctor reviewed the task list and concluded claimant could no longer perform 24 of 46 tasks for a 52 percent task loss. Accordingly, the Board finds claimant has sustained a 52 percent task loss.

The claimant has not looked for work since her release from treatment by Dr. Doornbos. Regarding claimant's wage loss for purposes of the permanent partial general disability formula, the Board concludes claimant has failed to prove she has made a good faith effort to find work in the open labor market. Consequently, the law requires the Board to impute a post-injury wage.

Respondent's vocational expert, Mr. Zumalt, concluded claimant retained the ability to earn between $8 and $9 per hour. Mr. Hardin, who is claimant's vocational expert, did not offer an opinion regarding claimant's wage earning ability. The Board imputes a post-injury wage of $340. Comparing claimant's pre-injury wage of $720.40, as determined by the ALJ, to $340 yields a 53 percent wage loss.

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[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] Id. at 320.

Averaging claimant's 53 percent wage loss with her 52 percent task loss yields a 52.5 percent permanent partial general disability.

As previously noted, at regular hearing the respondent reported paying a total of $63,267.28 in temporary total disability compensation at the rate of $366 per week. An itemization of the dates such compensation was paid was not provided. Instead, respondent stated the total included amounts paid in both docketed claims and both respondent and claimant thought most of the payments were made in Docket No. 261,067. The Board determined that temporary total disability compensation was paid for 10.86 weeks in Docket No. 255,016. Consequently, temporary total disability compensation was paid for 162 weeks in Docket No. 261,067.[12]

AWARD IN DOCKET NO 255,016

WHEREFORE, it is the finding of the Board that the Award of Special Administrative Law Judge J. Paul Maurin III dated September 29, 2003, is modified to reflect that claimant is entitled to 10.86 weeks of temporary total disability compensation and authorized medical compensation until released from treatment by Dr. Spann.

The claimant is entitled to 10.86 weeks of temporary total disability compensation at the rate of $366 per week or $3,974.76.

AWARD IN DOCKET NO 261,067

WHEREFORE, it is the finding of the Board that the Award of Special Administrative Law Judge J. Paul Maurin, III dated September 29, 2003, is modified to reflect that claimant suffered a 52.5 percent permanent partial general disability.

The claimant is entitled to 162 weeks of temporary total disability compensation at the rate of $401 per week or $64,962 followed by permanent partial disability compensation at the rate of $401 per week not to exceed $100,000 for a 52.5 percent work disability.

As of April 22, 2004, there would be due and owing to the claimant 162 weeks of temporary total disability compensation at the rate of $401 per week in the sum of $64,962 plus 24.43 weeks of permanent partial disability compensation at the rate of $401 per week in the sum of $9,796.43 for a total due and owing of $74,758.43, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the

[12] Dividing the total amount of temporary total disability compensation by the weekly compensation rate yields 172.86 weeks of temporary total compensation paid. 172.86 weeks minus the 10.86 weeks of temporary total disability compensation paid in Docket No. 255,016 yields 162 weeks.

amount of $25,241.57 shall be paid at the rate of $401 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of April 2004.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
J. Paul Maurin III, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge
Paula Greathouse, Workers Compensation Director